IN THE

SUPREME COURT OF THE UNITED STATES

79-69

October Term, 1979

COMMONWEALTH OF PENNSYLVANIA

v.

WILLIAM J. KELLY, *Appellant*

JURISDICTIONAL STATEMENT ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

COMMONWEALTH OF PENNSYLVANIA

v.

WILLIAM J. KELLY, *Appellant*

JURISDICTIONAL STATEMENT OF APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

Appellant appeals from the judgment of the Supreme Court of Pennsylvania entered on April 13, 1979, denying Appellant's Petition for Reargument and sustaining Appellant's conviction, and submits this statement to prove that the Supreme Court of the United States has jurisdiction of the Appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Pennsylvania is reported at 399 A.2d 1061 (1979) while the official report of this opinion has not been reported. A copy of this opinion is attached hereto as Appendix "A". The opinion of the Superior Court of Pennsylvania is reported at 245 Pa. Super. 351, 369 A.2d 438 (1976). The opinion of the Court of Common Pleas of Philadelphia County is unreported and is attached hereto as Appendix "B".

JURISDICTION

1. This suit originated when Appellant was tried and convicted of violations of the Pennsylvania Crimes Code, 18 Pa.C.S.A. §5101 (obstructing the administration of law), 18 Pa.C.S.A. §4902 (perjury) and 18 Pa.C.S.A. §4701 (bribery).

2. The judgment of the Supreme Court of Pennsylvania was entered on March 14, 1979 and a Petition for Rehearing was denied to this Honorable Court in the Court of Common Pleas of Philadelphia County on May 23, 1979, a copy of which is attached hereto as Appendix "C".

3. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2).

4. The Appellant filed the Notice of Appeal to this Honorable Court in the Court of Common Pleas of Philadelphia County, on May 23, 1979, a copy of which is attached hereto as Appendix "D".

STATUTE INVOLVED

The Courts of Pennsylvania have upheld the constitutionality of Section 10-110 of the Philadelphia Home Rule Charter, which reads as follows:

> If any officer or employee of the City shall willfully refuse or fail to appear before any court, or before the Council, or any committee thereof, or before any officer, department, board, commission or body authorized to conduct any hearing or inquiry, or having appeared, shall refuse to testify or to answer any question relating to the affairs or government of the City or the conduct of any City officer or employee on the ground that his testimony or answers would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any matter about which he may be asked to testify before such court or at any such hearing or inquiry, he shall forfeit his office or position, and shall not be eligible thereafter for employment to any position in the City service.

QUESTIONS PRESENTED

Whether Section 10-110 of The Philadelphia Home Rule Charter, which declares that an employee of the City of Philadelphia who asserts his privilege against self-incrimination or refuses to waive his right to immunity shall forfeit his right to employment by the City, is so coercive as to violate the provisions of the Fourteenth and Fifth Amendments of the Untied States Constitution and render any testimony given pursuant to its provisions as being unconstitutionally coerced and inadmissible as evidence in a criminal trial of the employee.

STATEMENT OF CASE

Under Section 10-110 of The Philadelphia Home Rule Charter, the Appellant, a Philadelphia police officer, was forced to choose between his Fifth Amendment rights and his job when he was called before the Investigating Grand Jury on December 18, 1974. At that time, he was sworn in and warned that if he were a city employee and he chose to claim a constitutional privilege, then further instructions based on Section 10-110 of The Philadelphia Home Rule Charter would be necessary. The Appellant did not request any further instructions and, on December 20, 1974, he testified before the Investigating Grand Jury which was investigating corruption in the Philadelphia Police Department. He answered a series of questions concerning his duties as a policeman but did assert his privilege against self-incrimination in answer to two of the many questions asked him.

Appellant raised the issue of the admissibility of his Grand Jury testimony in his Motion to Suppress before trial and during his trial. See, Notes of Testimony, page 222. In both his appeals to the Superior and Supreme Courts of Pennsylvania, Appellant raised the issue of the unconstitutionality of Section 10-110 of the Philadelphia Home Rule Charter.

The Appellant was found guilty by a jury of obstruction of the administration of law, perjury and bribery. At his trial, the Notes of Testimony of his Grand Jury appearance were admitted into evidence and read to the jury. This testimony formed the basis of the Appellant's conviction for perjury and, also, helped establish the Commonwealth's case concerning the other substantive crimes. See, Notes of Testimony, pages 240 and 245.

Concerning the Appellant's objection to the admission of this testimony, the trial judge, the Honorable Stanley L. Kubacki, in an opinion dated March 18, 1976, concluded as follows:

> The defendant contends further that it was improper to admit his grand jury testimony. upon which two counts of perjury were based, since it was allegedly given involuntarily under the coercion of City "Charter" warnings, when the defendant was warned of his rights prior to his grand jury appearance. The supervising judge expressly advised him that he was not compelled to testify under the appropriate "Charter" provisions but, rather, that he had a right to remain silent. Thus, this contention has no factual basis. (Appendix "B").

The Superior Court of Pennsylvania, in an opinion by the Honorable T. Jacobs, dated November 22, 1976, rejected the trial court's reasoning while accepting its conclusion. It held that the Appellant's Grand Jury testimony was not coerced, "[I]nasmuch as the Charter warnings were never given.'" 245 Pa. Super. at 362, 369 A.2d at 443. Furthermore, it held that since the Appellant did assert his privilege against self-incrimination to two of the many questions he was asked before the Grand Jury, he waived his right to claim that his testimony was coerced.

Thus, the Superior Court held that a city employee who is testifying under a forfeiture statute similar in effect to that which this Court has repeatedly struck down since *Garrity v. New Jersey*, 385 U.S. 493 (1967) can have his coerced testimony used against him in a criminal trial if the actual words of the forfeiture statute are not read to him prior to his testifying.

The Supreme Court of Pennsylvania affirmed the Superior Court on this issue without further comment.

PRESENTATION OF A SUBSTANTIAL FEDERAL QUESTION

1. Jurisdiction Under 28 U.S.C. §1257 (2)

The Supreme Court of Pennsylvania, the highest court of that Commonwealth, affirmed the decision of the Superior Court of Pennsylvania which, in turn, had affirmed the trial court's refusal to grant the Appellant's Post-Trial Motions for a new trial. On April 13, 1979, the Supreme Court of Pennsylvania denied Appellant's Petition for Reargument, thus making their affirmance a final judgment. *Market St. Reg. Co. v. Railroad Commission of State of California*, 324 U.S. 548, *rehearing denied*, 324 U.S. 890 (1945).

The Appellant raised his Federal constitutional question before, during and immediately following his trial. On each occasion, the trail court held that the statute in question was not so coercive as to render any testimony given by a city employee to be constitutionally defective. The Superior Court affirmed this judgment for the reason that the specific statutory prohibition against a city employee's claiming a privilege against self-incrimination was not read to the Appellant before he testified. Throughout these proceedings, the Appellant has argued that the statute, itself, is constitutionally infirm, regardless of whether it was read to the Appellant before he testified, since the Appellant was aware of the provisions of the statute and decided to testify solely to retain his job.

The statute had a direct bearing on the conviction of the Appellant, since it was the statute which forced the Appellant to testify before the Grand Jury and it was this Grand Jury testimony which was used to convict the Appellant. *Garrity v. New Jersey, supra.* The Superior Court of Pennsylvania refused to hold that the statute was unconstitutional, and the Supreme Court of Pennsylvania affirmed this holding without comment.

Thus, the highest court of the Commonwealth of Pennsylvania has declared a state law to be valid as against an attack on its constitutionality. However, if this Honorable Court does not consider an appeal to be the proper procedure for review, then Appellant requests that the papers and proceedings herein be recorded and acted upon as a Petition for Certiorari under Title 28 of the United States Code, Section 2103.

2. The Federal Questions Presented are Substantial

The Supreme Court of Pennsylvania refused to grant Police Officer Kelly's appeal because the actual words of Section 10-110 of The Philadelphia Home Rule Charter were not read to him before he testified to the Grand Jury. Even though every city employee is on constructive notice of the warnings contained in The Home Rule Charter, and even though Police Officer Kelly was aware of the specific warnings contained in The Home Rule Charter, the Court held that the "magic" words of The Home Rule Charter warnings must be read to a city employee in order for his testimony to be held to be coerced.

Reference was made to The Home Rule Charter warnings by the judge who administered the oath to the Appellant at the Grand Jury. Therefore, the Appellant was on notice that the forfeitures stated in The Home Rule Charter were applicable to his testimony before the Grand Jury. Yet, the Pennsylvania courts have decided that actual or constructive notice of The Home Rule Charter warnings was not controlling; the actual reading of the warnings was necessary to claim that testimony given pursuant to such warnings was coerced. By this formalistic approach to constitutional rights, the Pennsylvania courts have attempted to give new life to a law long held to be unconstitutional by this Court.

The decisions of the Pennsylvania courts in upholding the constitutionality of this forfeiture statute are in direct conflict with the decisions of this Honorable Court. *Garrity*

v. New Jersey, supra; Gardner v. Broderick, 392 U.S. 273 (1968); *Lefkowitz v. Turley,* 414 U.S. 70 (1973); *Lefkowitz v. Cunningham,* 431 U.S. 801 (1977).

William Kelly, the Appellant, was a Philadelphia Police Officer. As such, he was subject to dismissal from the Police Department if he refused to testify before the Investigating Grand Jury. He was a target of that Grand Jury and was eventually indicted by them. The Appellant knew of Section 10-110 of The Philadelphia Home Rule Charter and, also, knew he would be fired if he did not testify. There were no provisions in that law for immunized testimony, either use or transactional. Without being given such immunity, Officer Kelly's rights under the Fourteenth and Fifth Amendments were trampled upon.

This Court in *Lefkowitz v. Cunningham, supra,* laid to rest all doubts concerning the constitutionality of forfeiture statutes, such as the one in the present case. After analyzing *Garrity* and its progeny, the Court forcefully concluded:

> These cases settle that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized. *Lefkowitz v. Cunningham, supra,* at 806.

As a Grand Jury witness, the Appellant was protected by the Fifth Amendment from being forced to give testimony which could later be used to convict him. *United States v. Washington,* 431 U.S. 181 (1977). The testimony given by the Appellant to the Grand Jury was coerced in that it was given under the forfeiture statute, but without any protection against its later use against the Appellant. Thus, the prosecutor in this case forced the Appellant to give testimony against himself by calling him as a witness before the Grand Jury, in that the prosecutor knew that the Appellant was a target of the Grand Jury, yet he also knew that Appellant was forced to testify or lose his job. See,

United States v. Doss, 563 F.2d 265 (6th Cir. 1977). Even if the Appellant sought immunity, he would be dismissed from his job. Such economic compulsion has rendered similar statutes invalid under this Court's past decisions. *Uniformed Sanitation Men Ass'n., Inc. v. Commissioner of Sanitation,* 392 U.S. 280 (1968).

The Pennsylvania courts have attempted to avoid the past holdings of this Court by declaring that such forfeiture statutes render testimony given under them to be invalid only if the statute is actually read to the employee before he testifies or only if he never asserts his privilege against self-incrimination during his testimony. Neither of the above-stated holdings is consistent with either the spirit or the word of *Lefkowitz v. Cunningham, supra.* In that case, the Court clearly held that in order for a state to compel its employees to testify, it must offer them the protection, at least, of use immunity.

In recognizing the effect of *Garrity v. New Jersey, supra,* and its progeny on its own forfeiture statute, the State of New Jersey has repealed its offensive forfeiture statute and replaced it with a use immunity law for all employees who are compelled to testify. N.J.S.A. 2A:81—17.2a1 and 2A:81—17.2a2. Its courts have held that such immunity must leave an employee in the same position as if he had asserted the privilege against self-incrimination. *State v. Portash,* 151 N.J. Super. 200, 376 A.2d 950 (1977).

The decision of the Pennsylvania courts in this case has left the law in Pennsylvania concerning its forfeiture statute in a state of disarray. See *DiCiacco v. Civil Service Commission of Philadelphia,* —— *Pa. Cmwlth.* ——, 339 A.2d 703 (1978) and *Strauss v. Civil Service Commission of Philadelphia,* —— *Pa. Cmwlth.* ——, 398 A.2d 1064 (1979). The ill-effects of Pennsylvania's attempt to circumvent the holdings of this Court may be to render invalid any prosecution involving a city employee who has been forced to give a statement under this forfeiture statute. The Philadelphia Police Department routinely takes such

coerced statements from police personnel and uses such statements against those personnel in disciplinary proceedings and in criminal prosecutions. *Commonwealth v. Triplett*, 462 Pa. 244, 341 A.2d 62 (1975).

Finally, while not relying on *United States v. Mandujano*, 425 U.S. 564 (1976), the Superior Court of Pennsylvania did cite that opinion as possibly controlling in this case, even if the Appellant's testimony were suppressed. *Commonwealth v. Kelly*, 245 Pa. Super. at 362, 369 A.2d at 444. There is no justification for this position. This Court in *Mandujano* specifically held that false statements made to a grand jury were not suppressable in a prosecution for perjury based on those statements, even though *Miranda* warnings were not given to the grand jury witness. The plurality opinion based its holding on the fact that the purpose of the warnings mandated by *Miranda v. Arizona*, 384 U.S. 436 (1966) would not be served by requiring them before a Grand Jury. The coercive atmosphere of custodial police interrogation is not present in the Grand Jury room. *United States v. Mandujano, supra*, at 580; *United States v. Dipp*, 581 F.2d 1323, 1327 (9th Cir. 1978).

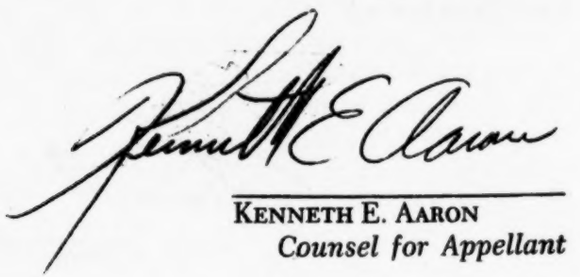
In the present case, the compulsion is inherent in the statute which compels a city employee to testify without granting him immunity. *Garrity* and its progeny are not based on any hope to deter prohibited police activity as was *Miranda*, but, rather, more on the nature of psychological compulsion as was found in *Chambers v. Florida*, 309 U.S. 227 (1940).

Furthermore, the Appellant's grand jury testimony was used against him at trial to prove the non-perjury offenses; such a use may not be harmonized with the Appellant's Fifth Amendment rights. *United States v. Apfelbaum*, 584 F.2d 1264, 1271 (3rd Cir. 1978).

In conclusion, the decision of this Court in *Lefkowitz v. Cunningham, supra*, is controlling over the issues presented by this appeal and this Court should allow this appeal in order to protect and enforce its past holdings in

Garrity and its progeny. Without such a review, Pennsylvania will have been able to avoid the effects of *Garrity* and its progeny and will have provided a sinister precedent to other states who seek to dampen the rights of their employees by economically coercing them to forfeit their constitutional rights.

Respectfully submitted,

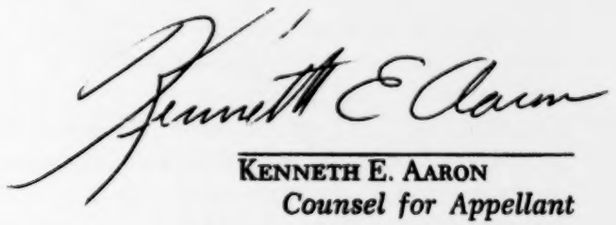


KENNETH E. AARON
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 1979, three (3) true and correct copies of Appellant's Jurisdictional Statement were personally served on Robert B. Lawler, Assistant District Attorney, 2300 Centre Square West, Philadelphia, Pennsylvania 19102.

I further certify that all parties required to be served have been served.



KENNETH E. AARON
Counsel for Appellant

Appendix "A"

IN THE
SUPREME COURT OF PENNSYLVANIA
Eastern District

	: No. 417 January Term, 1977
COMMONWEALTH OF PENNSYLVANIA	: Appeal from the Judgment of the Superior Court filed November 22, 1976 at No. 1074 October Term, 1976, Affirming the Orders of Judgments of Sentence of the Court of Common Pleas, Trial Division, Criminal Section, Philadelphia, at Nos. 2381 to 2385 March Term, 1975.
vs.	
WILLIAM J. KELLY, *Appellant*	

OPINION OF THE COURT

ROBERTS, J.: Filed March 14, 1979

In August 1975, appellant was convicted by a jury of one count of obstructing the administration of the law, 18 Pa. C.S.A. § 5101, three counts of perjury, 18 Pa. C.S.A. § 4902, and one count of bribery, 18 Pa. C.S.A. § 4701. Post-trial motions were denied and appellant was sentenced to three to twenty months in prison on the three perjury counts. Sentence was suspended on all other counts. On appeal the Superior Court affirmed. 245 Pa. Super. 351, 369 A.2d 438 (1976). After review of the record and consideration of appellant's contentions we find no basis for disturbing the order of the Superior Court and we affirm.*

* Appellant has argued that (1) he was entitled to complete transcripts of the grand jury testimony of prosecution witnesses and that the trial court erred in deleting those portions which it

Only one issue merits comment. The trial court in this case placed notations on the verdict slip seeking to identify for the jury the separate counts charged. We are satisfied that sending out with the jury a verdict slip with identifying notations is not prohibited by Rule 1114, Pa. R. Crim. P. Here, where there were numerous separate and distinct charges against appellant, we find no abuse of the trial court's discretion in concluding that there was a need for the identifying notations. The notations themselves, while not ideally drawn, were nevertheless in essence neutral and viewed in the context of the court's instructions not suggestive or prejudicial.

Unlike *Commonwealth v. Baker*, 466 Pa. 382, 353 A.2d 406 (1976), the language on the verdict slip here is not a condensed and potentially misleading statement of the court's instructions. On its face the verdict slip left to the jury the decision whether defendant was guilty or not guilty. That the notations referred incidentally to some aspect of the Commonwealth's evidence does not in and of itself require reversal in the circumstances of this case.

Nonetheless, it is not inappropriate to observe as a general prudential principle that identifying notations which are not completely neutral create a potential for prejudice. It is therefore desirable for trial courts in the exercise of their discretion: (1) to determine after consultation with counsel whether, due to the complexity of the charges and the nature of the trial, there is a clear need for identifying notations on a verdict slip to avoid confusion by the jury concerning the issues before it; and (2) if such a clear need appears, to determine, after conferring with counsel, the text which bests preserves the impartiality of the verdict slip. We are satisfied that trial courts together with counsel can achieve that result.

The judgment of the Superior Court is affirmed.

Mr. Chief Justice EAGEN did not participate in the consideration or decision of this case.

Former Justice POMEROY did not participate in the decision of this case.

Mr. Justice MANDERINO filed a dissenting opinion.

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* [cont'd from previous page]

deemed not relevant to the charge against appellant; (2) hearsay statements of an unindicted co-conspirator should not have been admitted into evidence; (3) giving to the jury a verdict slip containing notations descriptive of each count was prejudicial error; (4) appellant's grand jury testimony was coerced and therefore should not have been admitted at trial; (5) appellant should have been charged under 18 Pa. C.S.A. § 5301 rather than 18 Pa. C.S.A. § 5101; (6) certain records were not properly qualified and hence should not have been admitted; (7) the trial judge's charge and his conduct during trial were prejudicial; and (8) the evidence against the appellant was insufficient.

[J-374]

IN THE
SUPREME COURT OF PENNSYLVANIA
Eastern District

COMMONWEALTH OF PENNSYLVANIA	: No. 417 January Term, 1977
vs.	: Appeal from the Judgment of
WILLIAM J. KELLY, *Appellant*	: the Superior Court filed November 22, 1976, Affirming the Orders of Judgment of Sentence of the Court of Common Pleas, Trial Div., Criminal Section, Philadelphia, at Nos. 2381 to 2385 March Term, 1975.

DISSENTING OPINION

MANDERINO, J. Filed March 14, 1979

I dissent. Rule 1114 of our Rules of Criminal Procedure specifies that "[u]pon retiring to deliberations, the jury shall not be permitted to have a transcript of any trial testimony, nor a copy of any written confession by the defendant, nor a copy of the information and indictment. Otherwise, upon retiring, the jury may take with it such *exhibits* as the trial judge deems proper." (emphasis added). Appellant argues here, as he did before the Superior Court, that the trial court erred in allowing the jury to take with it certain "verdict slips" on which the jury was to record its verdict as to each count against appellant, and on which a limited recitation of the facts forming the basis for each count was typed at the trial judge's direction. These "verdict slips" contained the following description of each count:

#2381 . . . Obstructing Administration of Law or Other Governmental Functions September 27, 1973
Arrest of Andy Marino (Sgt. Andrew Morrese) Chippy's Bar.

#2382. . . PERJURY:
FIRST COUNT:
Testimony of Defendant before Special Investigating Grand Jury on December 20, 1974 Regarding Truth of Statement in Oath Before Judge Melton to Secure Warrant:
SECOND COUNT:
Testimony of Defendant Before Special Investigating Grand Jury on December 20, 1974 Regarding Speaking to Narcise Prior to Raid on September 27, 1973.

#2383. . . PERJURY:
Oath of Defendant Before Judge Melton on September 27, 1973 that He Did conduct a Surveillance of Chippy's Bar on September 25, 1973 between the hours of 12:15 P.M. and 1:00 P.M.

#2384. . . BRIBERY IN OFFICIAL AND POLITICAL MATTERS:
FIRST COUNT:
Receipt of $20.00 from Narcise on or about July 30, 1973.
SECOND COUNT:
Receipt of $20.00 from Narcise on or about Sept. 7, 1973.
THIRD COUNT:
Receipt of $20.00 from Narcise on or about Sept. 18, 1973.
FOURTH COUNT:
Receipt of $50.00 from Narcise on or about Oct. 3, 1973.

The brief factual descriptions accompanying each count do not fall squarely within those items specifically prohibited by Rule 1114—namely, a transcript of trial testimony, a copy of a written confession or a copy of the information or indictment—nor are they "exhibits" such as may be permitted by the Rule. Nevertheless, the danger pre-

sented by allowing the jury to take those prohibited items with it during deliberations is equally present here. The prohibition "... are designed to ensure that the jury does not give undue weight to those written materials before them." Com. v. Bahe, —— Pa. ——, ——, 353 A.2d 406, 415 (1976) (dissenting opinion of Roberts, J.).

Mr. Justice Roberts words of dissent in *Comm. v. Bahe, supra,* are equally applicable here.

> "The court's procedure in this case could only encourage the jury to ignore the court's general instructions and to reach a verdict without a complete analysis of the issues involved.
>
> This could have created an impression with the jury that the court considered such definitions unimportant and is similar to an instruction to consider only part of the evidence. Moreover. the jury might have also structured its entire deliberation solely around answering these questions, thus short-circuiting full consideration of all the evidence and the general instructions. These dangers jeopardized defendant's right to a fair trial."

Id at ——, 353 A.2d at 416

Similarly, by including a brief description of some of the evidence associated with each count, the court in the instant case may have encouraged the jury to conclude that other evidence was considered unimportant by the court, and that the listed "facts" were the only ones that needed to be considered by the jury. Additionally, these cryptic summaries may have caused the jury to believe that the listed "facts" has been proven by the prosecution. "These dangers jeopardized [appellant's] right to a fair trial." Id at ——, 353 A.2d at 416. I therefore dissent.

Appendix "B"

Opinion of Stanley L. Kubacki Dated March 18, 1976

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY
TRIAL DIVISION-CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	MARCH TERM, 1975
vs.	:	NO. 2381-2385
WILLIAM J. KELLY	:	

OPINION

BY: JUDGE STANLEY L. KUBACKI

DATE: MARCH 18, 1976

The defendant was found guilty by a jury on one count of obstruction of the administration of law, three counts of perjury and one count of bribery in official matters.

The defendant is an officer with the Philadelphia Police Department. On July 30, 1973, he accepted $20.00 from a gambler in a West Philadelphia tap-room in exchange for not taking action against the latter's gambling operation. This "payoff" was observed by a Pennsylvania State Policeman who was assigned as an undercover investigator with the Pennsylvania Crime Commission.

In September, 1973, the defendant and the gambler became suspicious of the true identity of a man who was acting as a gambler but who in reality was another Pennsylvania State Policeman also assigned to the Crime Commission. Consequently, the defendant perjured himself in an affidavit submitted to a judge on September 27, 1973, in order to secure a search warrant. The defendant intended to verify his suspicions by an arrest. The warrant was issued and executed. The arrest of the agent compelled him to abandon his undercover activities.

The defendant appeared before an investigating grand jury on December 20, 1974. At that time he reaffirmed the facts contained in his search warrant affidavit and testified further that he had not spoken or met the gambler prior to the execution of the search warrant. It was material to this investigation for the Grand Jury to ascertain whether this defendant has accepted payoffs while serving as a police officer and if he has improperly secured a search warrant which served to obstruct a lawful investigation by the Pennsylvania Crime Commission into allegations of police corruption in Pennsylvania. As a result of the defendant's Grand Jury testimony he was indicted on two counts of perjury.

At the trial the witnesses included the gambler, who testified pursuant to a grant of immunity, the two Crime Commission investigators and several other fact witnesses. Demurrers were sustained to four counts of theft by extortion based upon the same incidents upon which the bribery counts were based.

The defendant first alleges in support of his motion that the

> "denial . . . of complete and unedited transcripts of prior testimony of prosecution witnesses violated defendant's right to . . . [*inter alia*] cross-examine witnesses against him."

At trial, the Commonwealth provided defense counsel with transcripts of testimony of prior Grand Jury and Pennsylvania Crime Commission hearings of certain prosecution witnesses. Since these investigations were ongoing, the Commonwealth deleted from these transcripts portions of testimony which referred to investigations which were unrelated to this defendant. This Court examined these confidential records and permitted the defendant access to certain additional portions which were determined to be "relevant to matters raised in direct examination." *Commonwealth v. Swierczewski*, 215 Pa. Super. 130, 135, 257

A.2d 336, 339 (1969). Considering the broad latitude within which defense counsel was allowed to cross-examine prosecution witnesses, his right of cross-examination was clearly protected.

The defendant's argument that hearsay evidence was improperly admitted is similarly without merit. The Commonwealth established well beyond a fair preponderance of the evidence that a conspiracy existed, *Commonwealth v. Hirsch*, 225 Pa. Super. 494, 497, 311 A.2d 679, 681 (1973), and that the declarations at issue were made

> "in the furtherance of and during the continuance of the common purpose. . . ."

Commonwealth v. Ransom, 446 Pa. 457, 461, 288 A.2d 762, 764 (1972), quoting from *Commonwealth v. Holloway*, 429 Pa. 344, 346, 240 A.2d 532, 533-34 (1968) (*emphasis added in Ransom*). See also McCormick, *Evidence* §244 at 522 (1954). These statements clearly fell within the co-conspirator exception to the hearsay rule and were properly admitted.

The defendant also asserts that he was improperly charged with violating a general penal proviso where a more specific statute was available. The unlawful conduct of the defendant did constitute a violation of 18 P.S. §5301, Official Oppression. However, 18 P.S. §5101, Obstructing Administration of Law or Other Governmental Function, more fully covered the incident in question which went beyond a mere unlawful arrest into the obstruction of an on-going investigation of allegations of police corruption.

The defendant contends further that it was improper to admit his grand jury testimony, upon which two counts of perjury were based, since it was allegedly given involuntarily under the coercion of City "charter" warnings. When the defendant was warned of his rights prior to his grand jury appearance, the supervising judge expressly advised him that he was not compelled to testify under the appropriate "charter" provisions but, rather, that he had a right to remain silent. Thus, this contention has no factual basis.

Exhibits C-3, C-4 and C-5 were properly admitted, 28 P.S. §91b, and neither the charge to the jury nor the form of the jury instruction and verdict sheets, prejudiced the defendant in any way.

KUBACKI,

J.

Appendix "C"

IN THE
SUPREME COURT OF PENNSYLVANIA
Eastern District

April 17, 1979

Armando A. Pandola, Jr., Esquire
935 Lafayette Building
Philadelphia, PA 19106

Re: Commonwealth of Pennsylvania v. William J. Kelly, Appellant No. 417 January Term, 1977

Dear Mr. Pandola:

This is to advise you that the Petition for Reargument filed in the above-captioned appeal was denied by the Court on April 13, 1979.

Very truly yours,

Sally Mrvos
Prothonotary

SM/fm

Appendix "D"

IN THE
SUPREME COURT OF PENNSYLVANIA
Eastern District

COMMONWEALTH OF PENNSYLVANIA, *Appellee*	: No. 417 January Term, 1977
vs.	:
WILLIAM J. KELLY *Appellant*	:

NOTICE OF APPEAL

To the Prothonotary:

Please be notified that WILLIAM J. KELLY, Appellant, appeals the Judgment of the Honorable Court of April 13, 1979 in the above-captioned matter to the Supreme Court of the United States. This appeal is taken under 28 U.S.C. §1257(2).

DAVIDSON, AARON & TUMINI

KENNETH E. AARON, ESQUIRE
Attorney for Appellant
935 Lafayette Building
Philadelphia, Pa. 19106
(215) 629-1100

Filed: May 23, 1979

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979
NO. 79-69

WILLIAM J. KELLY, APPELLANT
v.
COMMONWEALTH OF PENNSYLVANIA, APPELLEE

APPEAL FROM THE PENNSYLVANIA SUPREME COURT
MOTION TO DISMISS

MICHAEL F. HENRY
CHIEF, MOTIONS UNIT
BERNARD L. SIEGEL
DEPUTY DISTRICT ATTORNEY
FOR INVESTIGATIONS
STEVEN H. GOLDBLATT
DEPUTY DISTRICT ATTORNEY
FOR LAW
EDWARD G. RENDELL
DISTRICT ATTORNEY

2400 CENTRE SQUARE WEST
PHILADELPHIA, PENNSYLVANIA 19102

MOTION TO DISMISS

PURSUANT TO RULE 16(1)(A) AND (B) OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES, APPELLEE MOVES THE COURT TO DISMISS THE APPEAL HEREIN ON THE GROUND THAT THE APPEAL IS NOT WITHIN THE JURISDICTION OF THIS COURT AS HEREINAFTER SET FORTH.

STATEMENT

THIS IS AN APPEAL FROM THE JUDGMENT OF THE PENNSYLVANIA SUPREME COURT, REPORTED AS COMMONWEALTH V. KELLY, 399 A.2D 1061 (PA. 1979), WHICH JUDGMENT AFFIRMED APPELLANT'S STATE COURT JURY CONVICTIONS FOR THREE COUNTS OF PERJURY, ONE COUNT OF OBSTRUCTION OF JUSTICE AND ONE COUNT OF BRIBERY. APPELLANT HAD PREVIOUSLY APPEALED HIS CONVICTIONS TO PENNSYLVANIA'S INTERMEDIATE APPELLATE COURT, WHICH ALSO AFFIRMED THE JUDGMENT OF SENTENCE, AS REPORTED IN COMMONWEALTH V. KELLY, 245 PA. SUPERIOR CT. 351 (1976). THE FACTS UNDERLYING THE APPEAL ARE BRIEFLY AS FOLLOWS: THE ON-GOING PENNSYLVANIA CRIME COMMISSION INVESTIGATION OF CORRUPTION IN PHILADELPHIA RESULTED IN CHARGES THAT APPELLANT, A POLICE OFFICER, HAD RECEIVED SUMS OF MONEY A NUMBER OF TIMES IN 1973 FROM ONE JOSEPH

ANTHONY NARCISE, IN EXCHANGE FOR WHICH APPELLANT WOULD REFRAIN FROM INTERFERING WITH AN UNLAWFUL GAMBLING OPERATION IN WHICH NARCISE WAS INVOLVED. THE OBSTRUCTION CHARGE ALLEGED THAT IN SEPTEMBER, 1973, APPELLANT AND NARCISE BECAME SUSPICIOUS OF AN UNDERCOVER AGENT, ANDREW NARRESE, WHO WAS POSING AS A GAMBLER, AND ARRANGED TO HAVE THE AGENT ARRESTED AND THUS BLOW HIS COVER. ONE OF THE PERJURY COUNTS CHARGED APPELLANT WITH MAKING FALSE STATEMENTS UNDER OATH BEFORE PHILADELPHIA MUNICIPAL COURT JUDGE MELTON WHO THEN ISSUED A SEARCH WARRANT WHICH LED TO THE ARREST OF THE UNDERCOVER AGENT. APPELLANT WAS ALSO CHARGED WITH TWO COUNTS OF PERJURY AS A RESULT OF HIS TESTIMONY BEFORE THE JANUARY, 1974 SPECIAL INVESTIGATING GRAND JURY,[1] WHEREIN HE REASSERTED THE FACTS SWORN TO IN THE SEARCH WARRANT AFFIDAVIT, AND DENIED ANY PRIOR DEALINGS WITH NARCISE. APPELLANT CONTENDED PRIOR TO TRIAL, BEFORE PHILADELPHIA COURT OF COMMON PLEAS JUDGE STANLEY KUBACKI, THAT HIS GRAND JURY TESTIMONY WAS COERCED. HE CLAIMED THAT THE MERE EXISTENCE OF § 10-110 OF THE PHILADELPHIA HOME RULE CHARTER TAINTED HIS GRAND JURY TESTIMONY. THAT

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1. COPIES OF APPELLANT'S TESTIMONY BEFORE THIS GRAND JURY AS WELL AS THE WARNINGS ADMINISTERED TO HIM PRIOR TO SAID TESTIMONY ARE ATTACHED HEREIN AS APPENDICES A AND B RESPECTIVELY.

CHARTER PROVISION PROVIDESS INTER ALIA, FOR THE DISMISSAL OF CITY EMPLOYEES WHO FAIL TO TESTIFY BEFORE ANY COURT OR INVESTIGATIVE BODY CONCERNING THEIR OFFICIAL DUTIES. APPELLANT'S CLAIM WAS REJECTED BY THE PENNSYLVANIA COURTS SINCE HE WAS NEVER GIVEN THE ALLEGEDLY COERCIVE WARNINGS OF THE HOME RULE CHARTER. ADDITIONALLY, SINCE HE WAS SELECTIVE IN HIS ANSWERS TO QUESTIONS PROPOUNDED, INVOKING HIS FIFTH AMENDMENT PRIVILEGE ON A NUMBER OF OCCASIONS, HIS GRAND JURY TESTIMONY WAS CLEARLY NOT COERCED BY THE MERE EXISTENCE OF THE HOME RULE CHARTER. THIS WAS THE PRECISE HOLDING OF THE SUPERIOR COURT. COMMONWEALTH V. KELLY, 245 PA. SUPERIOR CT. 351, 362, AFF'D, 399 A.2D 1061, (1979).

ARGUMENT

I. THIS CASE IS NOT WITHIN THE APPELLATE JURISDICTION OF THIS COURT UNDER 28 U.S.C. § 1257(2)

IN THE INSTANT CASE APPELLANT CLAIMS THAT THIS COURT HAS DIRECT APPELLATE JURISDICTION UNDER 28 U.S.C. § 1257(2). SUCH A CLAIM IS ERRONEOUS SINCE APPELLANT CANNOT ESTABLISH THAT THE PENNSYLVANIA STATE COURTS PASSED UPON THE CONSTITUTIONALITY OF THE PHILADELPHIA HOME RULE CHARTER PROVISION REFERRED TO ABOVE. IN GARRITY V. STATE OF NEW JERSEY, 385 U.S. 493 (1967), THIS COURT CONSIDERED THE

PROPRIETY OF DIRECT APPELLATE REVIEW UNDER 28 U.S.C. 1257(2). IN GARRITY, THE NEW JERSEY SUPREME COURT DECLINED TO RULE ON THE VALIDITY OF ITS FORFEITURE STATUTE, EVEN THOUGH THE DEFENDANT THEREIN WAS WARNED THAT HE WOULD BE SUBJECT TO REMOVAL PURSUANT TO THAT STATUTE IF HE INVOKED HIS FIFTH AMENDMENT PRIVILEGE. THIS COURT HELD:

> THE STATUTE IS THEREFORE TOO TANGENTIALLY INVOLVED TO SATISFY 28 U.S.C. § 1257(2), FOR THE ONLY BEARING IT HAD WAS WHETHER, VALID OR NOT, THE FEAR OF BEING DISCHARGED UNDER IT FOR REFUSAL TO ANSWER ON THE ONE HAND AND THE FEAR OF SELF-INCRIMINATION ON THE OTHER WAS "A CHOICE BETWEEN THE ROCK AND THE WHIRLPOOL" WHICH MADE THE STATEMENTS PRODUCTS OF COERCION IN VIOLATION OF THE FOURTEENTH AMENDMENT.

ID. AT 496.

IN THE INSTANT CASE, THE COMPLAINED OF HOME RULE CHARTER PROVISION WAS NOT EVEN TANGENTIALLY INVOLVED SINCE PETITIONER WAS NEVER GIVEN THE CHARTER WARNINGS AND, IN FACT, ASSERTED HIS PRIVILEGE TO DECLINE TO ANSWER TWO SEPARATE QUESTIONS. COMMONWEALTH V. KELLY, SUPRA AT 362. IT IS THEREFORE CLEAR THAT THERE IS NO JURISDICTION HEREIN INVOLVED UNDER 28 U.S.C. § 1257(2). ADDITIONALLY, AS THE WARNINGS WERE NEVER EVEN GIVEN IN THIS CASE, NO ISSUE EXISTS WHICH WOULD

JUSTIFY REVIEW BY APPEAL OR CERTIORARI (AS THIS COURT DID IN GARRITY).

II. THE DECISION OF THE PENNSYLVANIA SUPREME COURT IS CLEARLY CORRECT AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN THIS APPEAL.

APPELLANT, PRIOR TO HIS GRAND JURY TESTIMONY WAS WARNED OF HIS RIGHT NOT TO INCRIMINATE HIMSELF. DURING HIS TESTIMONY HE ANSWERED CERTAIN QUESTIONS, BUT SELECTIVELY INVOKED HIS FIFTH AMENDMENT PRIVILEGE AS TO TWO QUESTIONS. HE WAS NEVER GIVEN ANY ALLEGEDLY COERCIVE HOME RULE CHARTER WARNINGS. THE PENNSYLVANIA COURTS DETERMINED THAT APPELLANT'S GRAND JURY TESTIMONY WAS VOLUNTARY SINCE HIS SELECTIVE ASSERTION OF HIS FIFTH AMENDMENT PRIVILEGE NEGATED ANY CLAIM THAT THE MERE EXISTENCE OF THE HOME RULE CHARTER COERCED HIS TESTIMONY. APPELLANT'S GRAND JURY TESTIMONY WAS THEREFORE PROPERLY INTRODUCED AT TRIAL.

THIS COURT HAS HELD THAT EVEN IF A PARTY SHOULD NOT HAVE BEEN COMPELLED TO TESTIFY BEFORE A GRAND JURY, IF FALSE TESTIMONY WAS IN FACT GIVEN, THE ERRONEOUSLY COMPELLED TESTIMONY WOULD NOT BE SUBJECT TO SUPPRESSION IN A SUBSEQUENT STATE PERJURY TRIAL. UNITED STATES V. MANDUJANO, 425 U.S. 564 (1976). IN LIGHT OF MANDUJANO NO SUBSTANTIAL FEDERAL QUESTION EXISTS WHICH WOULD JUSTIFY REVIEW BY APPEAL OR WRIT OF CERTIORARI.

CONCLUSION

FOR ALL THE FOREGOING REASONS, APPELLEE MOVES THAT THIS APPEAL BE DISMISSED.

BEFORE THE JANUARY, 1974,

SPECIAL INVESTIGATING GRAND JURY

Testimony of:

OFFICER WILLIAM KELLY

Friday, December 20, 1974, 4:13 P.M.

907 Five Penn Center Plaza
Philadelphia, Pa.

APPEARANCES:

PETER NOEL DUHAMEL, ESQUIRE,
Assistant Attorney General,
for the Office of the Special Prosecutor.

APPENDIX "A"

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OFFICER WILLIAM KELLY (Badge No. 3987, 3rd Police District), previously sworn, was examined and testified as follows:

EXAMINATION

MR. DUHAMEL: May the record reflect that there is a quorum of seventeen grand jurors present. My name is Peter Noel Duhamel. I am an Assistant Attorney General in the Office of the Special Prosecutor. At this time I will assist the grand jury by examining a witness who is appearing before the grand jury in regards to allegations of police corruption in the Philadelphia Police Department.

BY MR. DUHAMEL:

Q Would you please identify yourself by stating your name and your position for the record.

A Officer William Kelly, No. 3987, 3rd Police District.

Q Officer Kelly, is it correct that you were present during a hearing before Judge Takiff on Wednesday afternoon of this week?

A Yes.

Q And at that time is it true that Judge Takiff explained to all those present the law in regards to conflict of interest?

A Yes.

Q And is it true that you indicated at that time that

you fully understood the explanation as given by Judge Takiff?

A Yes.

Q And is it true that you still understand the instruction that was given by Judge Takiff regarding conflict of interest?

A Yes.

Q Are you presently represented by counsel?

A Yes.

Q And who is that counsel?

A Tony Pirillo.

Q Mr. Pirillo.

In electing to continue to be represented by Mr. Pirillo, is it true that you have elected to waive any possible future prejudice resulting from any conflict of interest?

A What's that again?

Q The Judge explained the possibility of conflict of interest developing in being represented by Mr. Pirillo.

A Right.

Q So he stated that if you elect to continue to be represented by Mr. Pirillo, which is your right, that thereby you are waiving any possible future prejudice which may result from any conflict of interest, is that correct?

17 b

A Right.

Q Thank you.

During what period of time were you an inspector's man in the West Police Division?

A From May of '72 to February, '74.

Q Was there any particular reason why you were transferred, or did you request a transfer out of that division --

A No, I didn't.

Q -- or just normal police practice?

Directing your attention to this document which has already been marked Grand Jury Exhibit No. 1, Marrese, 9/5/74, and is initialed "KS," would you please examine this document and identify it for the grand jury.

A Search warrant.

Q It's a search warrant.

Who is it requested by, sir?

A Me.

Q The grand jury can't read it, that's why I'm asking.

A Policeman William Kelly, No. 3987, West Police Division.

Q There is a DC number, is that correct?

A Yes.

Q Could you please state for the record what the DC number is?

18 b

Q And this document is a sworn document, is that correct?

A That's right.

Q You testified to the facts alleged therein under oath, is that correct?

A That's right.

Q Could you please read the probable cause section, which is the facts you swore to under oath, into the record?

A "Acting on information received from a reliable informant who in the past four months has given me information that has led to three arrest for this type of violation resulting in all three being held for court, physical evidence being confiscated. On 9/24/73 at approximately 12:30 p.m. my informant had cause to be inside the 'Chippy's Bar' located at 6400 Vine Street and did place with the bartender two horse bets and three number bets, the bartender is known to him as 'Joe.' On 9/25/73 between the hours of 12:15 p.m. and 1:00 p.m. surveillance was set up on the above location and I observed twenty-two people enter and leave this location after one or two minutes. On 9/26/73 between the hours of 12:30 p.m. and 1:00 p.m. surveillance was again set up

on this location and on this occasion I did observe twenty-five persons enter this location and leave after staying approximately two to three minutes. From information received and my personal observations it is my belief that the above subject is engaged in an illegal lottery and book-making operation which he conducts from inside 'Chippy's Bar,' above location."

Q Thank you, sir.

Now, you did swear to these facts under oath, is that correct?

A That's correct.

Q And are these facts as alleged in the probable cause section that you just read into the record, are they in fact true?

A That's correct.

Q Thank you, sir.

Officer Kelly, do you know an individual by the name of Joe Narcise?

A Yes.

Q What is your relationship with this individual?

A No relationship.

Q How do you happen to know this individual?

A I had a search warrant for him.

Q Is this the search warrant that you just read?

A That's right.

Q Have you ever had occasion to speak with Mr. Narcise prior to the execution of this search warrant?

A No.

Q Did you have any we'll say hearsay knowledge of Mr. Narcise prior to the time of the search warrant? Had you heard -- let me put it this way -- I don't mean to confuse you -- if I understand correctly, as a plain-clothes officer, an inspector's man in the West Police Division, it was in a sense one of your duties to investigate instances of gambling violations, is that correct?

A That's correct.

Q And pursuant to those duties did you ever become aware of information regarding gambling activities being conducted by Mr. Narcise other than the facts that were alleged in the search warrant?

A No.

Q Have you ever -- or, excuse me, had you ever spoken to Mr. Narcise personally prior to the execution of this search warrant?

A No.

Q Had you ever met Mr. Narcise in Chippy's Bar and had a drink with him and talked with him at that time while drinking with him? 21 b

A At what time?

Q During the conversation with him, while having a drink at Chippy's Bar, at any time prior to the execution of the search warrant.

A No.

Q Have you ever attempted to contact Mr. Narcise through a bartender by the name of Don Nigro?

A When?

Q At any time.

A I take the Fifth Amendment on that.

Q Fifth Amendment. Does that mean that you refuse to answer on the grounds that the answer might tend to incriminate you?

A Yes.

Q Has Mr. Narcise ever contacted you through Don Nigro?

A I take the Fifth.

Q Once again, just so it's clear for the record, when you say you take the Fifth, it will mean that you are refusing to answer on the grounds that the answer may tend to incriminate you, is that correct?

A That's right.

MR. DUHAMEL: Thank you, sir.

You may be excused for one moment, sir.

(The witness left the grand jury room

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at 4:20 o'clock p.m., whereupon the following ensued:)

MR. DUHAMEL: This is for the record. In considering prior testimony that has been given to the Investigating Grand Jury, the grand jury is now aware that Mr. Kelly's testimony has -- he has perjured himself by his testimony on two different occasions, by stating that the facts alleged in the search warrant are in fact true -- the grand jury has testimony indicating that this was not true -- by also stating that he has never met with Mr. Narcise in Chippy's Bar before. The grand jury also has testimony that that in fact is a lie. On July 30th, 1973, he did in fact meet with Mr. Narcise and that meeting was observed by Corporal Albert Pistone, who was working at that time in an undercover capacity for the Pennsylvania State Police.

(The witness returned to the grand jury room at 4:22 o'clock p.m.)

MR. DUHAMEL: On the record.

Officer Kelly, at this time the foreperson will instruct you as to the nature of your subpoena.

THE FOREMAN: You are advised that you

are under a continuing subpoena. When and if we want you back here, we will notify you either by mail, phone or through your attorney.

MR. DUHAMEL: And I'd also like to state for the record, Mr. Kelly, make sure that you understand it, that you are not permitted to discuss any grand jury matters that occurred this afternoon involving you with anyone other than your attorney, Mr. Pirillo, is that correct?

THE WITNESS: That's correct.

MR. DUHAMEL: And you understand that?

THE WITNESS: Yes.

MR. DUHAMEL: Fine. Thank you very much, sir. You are excused.

One more thing, for the record, if we have to contact you, should we do so through Mr. Pirillo?

THE WITNESS: Through the Police Department.

MR. DUHAMEL: You'd rather go through the Police Department. Fine. Thank you very much, sir.

(Testimony concluded at 4:23 o'clock p.m.)

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

—

GRAND JURY

RE: Investigation of Police Corruption

—

BEFORE: Hon. Harry Takiff, J.

—

Room 225 City Hall
Philadelphia, Penna.

—

Wednesday, December 18, 1974

—

PRESENT:

PETER N. DUHAMEL, ESQ.
Assistant Attorney General
Office of Special Prosecutor

HERBERT LEVIN, ESQ.
Attorney for Mary Boone

GUSTINE J. PELAGATTI, ESQ.
Attorney for Sylvester Fighera

APPENDIX "B"

HAROLD SCHULMAN ASSOCIATES
CERTIFIED SHORTHAND REPORTERS
SUITE 905 - 1 NORTH 13TH STREET
PHILADELPHIA, PENNSYLVANIA 19107
LO 3-5237-8

THE COURT: We have a number of witnesses. As I call your names, will you please identify yourself? Spell your name, your second name, and give your address for the record? Mary Boone?

MISS BOONE: Mary Boone. B-O-O-N-E, 3415 Disston Street.

THE COURT: Are you attended by Judge Levin? Good morning, Judge.

Mr. Eighera?

MR. FIGHERA: Sylvester F-I-G-H-E-R-A, 1921 South Hicks.

THE COURT: You are attended by Mr. Pelagatti?

MR. FIGHERA: Yes, sir.

THE COURT: Staff Inspector Edmund Zengolowicz? I trust I don't mispronounce your name.

LIEUTENANT COLE: Sir, he's not here. I understand he is on vacation.

MR. DUHAMEL: Your Honor, I received a call approximately at nine-twenty saying he didshow up today and he's proceeding over here. He is slightly delayed but he is proceeding over here.

THE COURT: Inspector Gregory Sambor?

LIEUTENANT COLE: He is en route, your Honor, and he will be here any moment.

THE COURT: Captain Bernard Small?

CAPTAIN SMALL: Here, your Honor.

THE COURT: Will you give your address, Captain Small?

CAPTAIN SMALL: Home address?

THE COURT: Either your home or business.

CAPTAIN SMALL: Philadelphia Police Department, Nineteenth District.

THE COURT: Lieutenant William Cole?

LIEUTENANT COLE: C-O-L-E, your Honor. District Attorney's Office.

THE COURT: Officer William Kelly?

OFFICER KELLY: Here, your Honor, K-E-L-L-Y.

THE COURT: Your address, sir?

OFFICER KELLY: Philadelphia Police Department, Third District.

THE COURT: Officer Charles Dougherty?

OFFICER DOUGHERTY: D-O-U-G-H-E-R-T-Y, Philadelphia Police Department, Nineteenth District.

THE COURT: Officer Stanley Hagerty?

OFFICER HAGERTY: H-A-G-E-R-T-Y, 2254.

THE COURT: Officer Candito?

OFFICER CANDITO: C-A-N-D-I-T-O, Philadelphia Police Department, West Police Division.

THE COURT: Officer Martin Grawl?

OFFICER GRAWL: Here, your Honor, G-R-A-W-L, Eighteenth Police District.

THE COURT: The gentleman who arrived belatedly?

INSPECTOR ZONGOLOWICZ: Inspector Zongolowicz. Z-O-N-G-O-L-O-W-I-C-Z, Special Affairs.

THE COURT: The missing gentleman is Inspector Gregory Sambor, and the information is he is en route. We will nevertheless proceed in his absence.

Miss Boone, gentlemen, I am the Supervising Judge for the Grand Jury which has subpoenaed you to appear before it. The Jury has requested your appearance because they have reason to believe you have in your possession knowledge and information which is relevant and material to the matter

currently being investigated by the Jury.

All witnesses who appear before the Jury, no matter in what capacity they do appear, are entitled to the instruction of the Court with respect to their rights and their duties, and I will appropriately instruct you at this time.

With respect to your rights, first you have the right to the advice and assistance of counsel. That means you may confer with an attorney and discuss with him any and all matters pertaining to your appearances before the Jury, including the right to disclose to your attorney, if you have one, everything that transpires before the Grand Jury after you have appeared and testified.

If you have counsel, you may confer with him before you testify, after you testify, and during any recesses which may be declared by the Jury. However, under our law, an attorney may not accompany a witness inside the Grand Jury room while the witness is actually appearing and testifying.

I will ask you individually with respect

to representation. Miss Boone, you are attended by Judge Levin. Have you had an opportunity to confer with him and has he advised you of your rights and privileges?

MISS BOONE: A little, not a lot.

THE COURT: Well, I will instruct the Deputy Attorney General to defer your appearance until you have had reasonable opportunity to discuss these matters with Judge Levin and get the benefit of his counsel and advice.

Mr. Fighera, have you had an opportunity to confer with Mr. Pelagatti?

MR. FIGHERA: Yes, sir.

THE COURT: And has he advised you of your rights and your privileges?

MR. FIGHERA: Yes, sir.

THE COURT: Inspector Zongolowicz, have you conferred with counsel, sir?

INSPECTOR ZONGOLOWICZ: No, sir.

THE COURT: Do you desire to do so prior to your appearance?

INSPECTOR ZONGOLOWICZ: No, sir.

THE COURT: Captain Small, have you

conferred with counsel?

CAPTAIN SMALL: No, sir.

THE COURT: Do you desire to do so prior to your appearance?

CAPTAIN SMALL: At this time, no sir.

THE COURT: Lieutenant Cole, have you conferred with counsel?

CAPTAIN SMALL: Mr. Pirillo, sir.

THE COURT: Has Mr. Pirillo advised you of your rights and privileges?

CAPTAIN SMALL: Yes, sir.

THE COURT: Officer Kelly, have you conferred with counsel?

OFFICER KELLY: Yes, sir.

THE COURT: With whom have you conferred?

OFFICER KELLY: Mr. Pirillo.

THE COURT: Has he advised you of your rights and privileges?

OFFICER KELLY: Yes, sir.

THE COURT: Officer Dougherty, have you conferred with counsel?

OFFICER DOUGHERTY: Yes, sir, Mr. Pirillo.

THE COURT: And has he advised you of you

rights and privileges?

OFFICER DOUGHERTY: Yes, sir.

THE COURT: Officer Hagerty, have you conferred with counsel?

OFFICER HAGERTY: No, sir.

THE COURT: Do you desire to confer with counsel prior to your appearance?

OFFICER HAGERTY: Yes, I could.

THE COURT: With whom do you wish to confer?

OFFICER HAGERTY: Mr. Pirillo.

THE COURT: And Officer Candito, have you conferred with counsel?

OFFICER CANDITO: No, sir.

THE COURT: Do you desire to do so prior to your appearance?

OFFICER CANDITO: Yes, sir.

THE COURT: With whom do you wish to confer?

OFFICER CANDITO: Mr. Pirillo.

THE COURT: Officer Grawl, have you conferred with counsel, sir?

OFFICER GRAWL: No, sir.

THE COURT: Do you desire to do so?

OFFICER GRAWL: With Mr. Pirillo, sir.

THE COURT: As I previously observed, the Deputy Attorney General will defer the appearances of the officers who have indicated they wish to confer with Mr. Pirillo until they have had an opportunity to do so.

With respect to the other witnesses who have not heretofore conferred with counsel and do not choose to do so at this time, gentlemen, if at any time during the course of your appearances before the Grand Jury, you do conclude that you do wish to avail yourselves of the opportunity to confer with counsel so that you may get the benefit of counsel's assistance and guidance with respect to your rights and privileges, if you will advise the Deputy Attorney General or the Court that that is your desire, an appropriate recess will be declared so that you will have a full and adequate opportunity to avail yourselves of that counsel.

Secondly, with respect to your rights, you have the right to refuse to answer any question as to which the answer might tend to incriminate you.

You may, if you wish, give a factual reason for your refusal, but you are not obliged to do so. It is merely sufficient that you state the legal conclusion that you are invoking your constitutional privileges against self-incrimination or any other constitutional privilege you may claim.

If you answer some questions, that does not mean that you are thereafter barred from invoking your privilege if it is appropriate to do so. You may invoke your privilege as to any specific question where you deem it appropriate. In this regard, let me caution you that the constitutional privilege against self-incrimination is a very real right that every citizen possesses and when it's appropriately exercised, it will be protected and enforced by the Court. However, it is not a right to be claimed arbitrarily or capriciously. Grand Juries are entitled to every witness' testimony, save only that testimony which is incriminatory in nature as to the individual who is testifying. The right is appropriately claimed when a witness reasonably and in good faith believes that the answer to a particular question put, may in fact

tend to incriminate him or her. Under such circumstances, it is appropriate to claim the privilege.

With respect to those of you who are employees of the City of Philadelphia, I do not know whether the circumstance will or will not arise, but should you claim constitutional privileg it may then become incumbent upon me to give you further instruction by reason of certain provisions of the Home Rule Charter. However, I will defer any such supplementary instruction until and unless that instruction is in fact required.

Next with respect to your rights. Should any problem of any nature arise during the course of your appearances before the Jury such as by way of illustration, if you are unsure as to whether you may appropriately claim your constitutional privilege or any other problem, you have a right to appear before me either alone or together with your counsel and obtain a Ruling from me on the matter. It is my obligation and responsibility as the Supervising Judge to be available and to rule upon any problem with which any witness may be confronted during the course of his or her appearance before

the Jury. And should the circumstances arise, I want you to understand that you have a right to call upon me, and I have a responsibility to you to rule upon any such problem. I am and will be available for such purposes.

Now, in addition to these rights, you have certain duties, the first of which is the obvious duty to give full, truthful and complete answers to all questions except only those questions which you decline to answer on the ground that the answer might tend to incriminate you. And secondly, you have the duty of secrecy. The Grand Jury proceeding is a secret proceeding for the benefit of both the Jury as well as for the benefit of the witnesses. I have already advised you that if you have counsel, you have a right to make a complete and total disclosure to your attorney of everything that transpires before the Grand Jury, including any information that you learned from the Grand Jury.

With that single exception, however, you are under duty to maintain secrecy as to the questions and answers, whether elicited during the course of your appearances, as to all other persons

be they members of your family, your household, your business and professional associates or anyone else.

Are there any questions?

MISS BOONE: Just I would like to state, your Honor, that I'm ready to appear whenever you want me.

THE COURT: Thank you. I know we have the benefit of your cooperation. You have always been most cooperative.

Very well, I will now administer the oath to you. Will you please rise and place your right hands upon the Bibles?

CAPTAIN SMALL: May I ask one question? Are we allowed to discuss anything, like not the specific questions, but the general theme with our superiors?

THE COURT: No.

CAPTAIN SMALL: Nothing at all, sir?

THE COURT: Nothing at all.

You and each of you do solemnly swear that the testimony you will give before the Grand Jury and the matters being inquired into by it

shall be the truth, the whole truth and nothing but the truth, so help you God.

Thank you very much.

(Whereupon Harold Schulman was sworn as official court stenographer for the Court of Common Pleas.)

CERTIFICATION

I hereby certify that the proceedings, evidence and objections noted, are contained fully and accurately in the notes taken by me on the hearing of the above deposition, and that this copy is a correct transcript of the same.

Harold Schulman, Notary Public
Certified Court Reporter